to which he was accustomed and suffer consequential embarrassments and drawbacks to which a person of his age will undoubtedly be exposed.

We have considered the awards in cases like *Ng Kay Thong* v. *Chee Shan Shong*,[6] *Lew Fa* v. *Seng Chong Metal Works Ltd.*[7] and *Saw Tong Seng* v. *Ong Kim Hoon*.[8] Those were also cases of amputation of the right arm in one case and the left arm in the other two. In particular, in the case of *Saw Tong Seng* v. *Ong Kim Hoon*, the injuries were much more serious in that the whole of the right arm had been amputated and the plaintiff therein lost the use of the right arm completely as it had been disarticulated from the shoulder joint. We assess general damages in respect of pain and suffering, loss of amenities and enjoyment of life, embarrassments, etc. at $20,000. As for loss of future earnings we assess damages at $10,000, making a grand total in respect of general damages of $30,000. Special damages have been agreed in the sum of $750 for the first plaintiff and $56 for the second plaintiff, his mother, in respect of transport expenses.

There will be judgment for the first plaintiff for the sum of $20,000 as general damages and $500 as special damages. There will be judgment for $37 for the second plaintiff.

The defendants will pay half the costs in the court below and the entire costs of appeal to the plaintiffs.

Appeal allowed.

Solicitors: *Hilborne & Co.; Drew & Napier.*

MALAYSIAN REPORTS

WONG CHOO YONG v. SAFETY INSURANCE CO. LTD.

[O.C.J. (Ibrahim J.) May 24, 1970]

[Kuala Trengganu — Civil Action No. 96 of 1966]

Road Traffic — Accident — Personal injuries — Claim to enforce judgment against insurers — Requisite notice to be given — Sufficency of — Road Traffic Ordinance, 1958, s. 80(2)(a).

Insurance — Motor lorry — Accident — Whether policy covered learner driver — Road Traffic Ordinance, 1958, s. 80(1).

The plaintiff's claim was made against the defendants/insurers under section 80(1) of the Road Traffic Ordinance, to enforce the judgment he had obtained against one Chin Yoon Sin (Civil Suit No. 20 of 1965) on a claim for damages in respect of personal injuries sustained by him in a traffic accident involving a motor lorry, which at the material time was driven by the said Chin Yoon Sin with the permission and under the tuition of its owner, Lai Mee Nam.

The defendant admitted all the plaintiff's allegations of fact except the following: (1) whether Chin Yoon Sin was driving the said motor lorry as a learner driver with the permission and under tuition of the said Lai Mee Nam; (2) whether the defendants had notice within the meaning of section 80(2)(a) of the Road Traffic Ordinance, 1958. These constituted the issues before the court.

Regarding the second issue, the plaintiff's solicitors sent a letter dated February 14, 1965, to the said Chin Yoon Sin with carbon copies extended to the said Lai Mee Nam and the present defendants. The decision of this issue depended on whether in the circumstances of this case, the said letter and the extension of its carbon copies to the defendants constituted sufficient and good notice for the purpose of section 80(2)(a). The said letter also contained the additional information that legal proceedings would be taken in the High Court at Kuala Trengganu. The last paragraph of the said letter read as follows: "We have accordingly been instructed to demand the payment to our client of the sum of $30,939.00 in full settlement of his claims and to file legal proceedings against you in the High Court at Kuala Trengganu unless within 10 days from receipt of this letter we receive a written admission of your liability for these claims." The main submission of the defendants was that these words did not constitute sufficient notice of proceedings as they amounted to no more than a conditional or a contingent threat that proceedings would proceed only if the addressee did not admit liability or if he admitted liability, he did not or made no arrangements to pay.

Held: (1) the said Chin Yoon Sin was driving the said motor lorry in the capacity of a learner driver and under the tuition of the owner, Lai Mee Nam, with his permission, and he was therefore an "insured person" within the meaning of section 80(1) of the said Ordinance;

(2) sufficient particulars had been given in the said letter to constitute it a sufficient notice to the defendants that proceedings were intended to be taken against the insured person. It was not an ideal notice but it nevertheless was of sufficient formality to be understood by a reasonable man as an intimation that legal proceedings were to be taken against the insured person.

Per Ibrahim J.: "The said section 80(2)(a) is identical with section 10(2)(a) of the English Road Traffic Act of 1934, except that in the English Act, the notice to be given to the insurer is notice of *the bringing of* the proceedings. As in this action the purported notice was given before the commencement of the proceedings, the difference in the two statutes is in my view immaterial when considering English authorities on this issue."

[Editorial Note: See *Safety Insurance Co. Ltd.* v. *Wong Choo Yong*, [1971] 1 M.L.J. 167 where the defendants' application for extension of time to file the record of appeal

was dismissed by the Federal Court. Owing to a delay in the receipt of the High Court judgment, we regret that the cases are not reported in sequence.]

Cases referred to:-

(1) *Ceylon Motor Insurance Association Ltd.* v. *Thambugala* [1953] 2 All E.R. 870.

(2) *Weldrich* v. *Essex & Suffolk Equitable Insurance Society Ltd.* 83 Ll.L.R. 91.

(3) *China Insurance Co. Ltd.* v. *Ng Siak Yow & Ors.* [1963] M.L.J. 244.

CIVIL ACTION.

H. L. Wrigglesworth for the plaintiff.

K. E. Hilborne for the defendants.

Cur. Adv. Vult.

Ibrahim J.: In this action the plaintiff's claim against the defendants is made under section 80(1) of the Road Traffic Ordinance No. 49/58 to enforce the judgment he had obtained against one Chin Yoon Sin on a claim for damages in respect of personal injuries sustained by him in a traffic accident involving motor lorry No. C.1043 which at the material time was driven by the said Chin Yoon Sin with the permission and under the tuition of its owner, Lai Mee Nam.

In his amended statement of claim the plaintiff alleges that:

"3. By a policy of insurance dated 20th July, 1963, and issued by the defendants as authorised insurers within the meaning of Part IV of the Road Traffic Ordinance, 1958 to one Lai Mee Nam in consideration of the payment of the premium of $189.00 including an extra $63.00 for tuition, then paid to them by the said Lai Mee Nam agreed for the period of 1 year from 6th July 1963 to insure the said Lai Mee Nam in respect of any liability which might be incurred by the said Lai Mee Nam or by any learner driver under tuition or being tested when driving motor lorry No: C.1043 of which the said Lai Mee Nam was the registered owner, in respect of the death of or bodily injury to any person caused by or arising out of the use on a road of the said motor lorry, being such liability in respect of third party risks as is required to be covered by a policy of insurance under section 75(1)(b) of the said Ordinance.

3A. The defendants in pursuance of section 75(4) of the said Ordinance delivered to the said Lai Mee Nam in respect of the said policy a certificate of insurance in the prescribed form.

4. ....

5. On 8th July 1963 during the currency of the said policy and while the said certificate of insurance was in full force and effect the plaintiff while riding his Honda Cub motor cycle No: C 4669 along Jalan Besar, Dungun in the State of Trengganu at about 8.15 a.m. at the junction of the said road and Jalan Pegawai was run into and sustained personal injuries whereby he suffered loss and expense by the negligent driving of one Chin Yoon Sin who was driving the said motor lorry as a learner driver with the permission and under the tuition of the said Lai Mee Nam.

6. On 20th May 1965 the plaintiff commenced legal proceedings in the High Court at Kuala Trengganu in Civil Suit No: 20 of 1965 against the said Chin Yoon Sin and the said Lai Mee Nam to recover damages in respect of the said personal injuries and loss and expense being such a liability as was covered by the terms of the said policy.

7. On 13th June, 1966 judgment was entered in the said suit by the Honourable Mr. Justice Raja Azlan Shah in favour of the plaintiff against the said Chin Yoon Sin and the said Lai Mee Nam for the sum of $35,200 general damages, $815.00 special damages and costs to be taxed.

8. By reason of the provisions of section 80(1) of the said Ordinance the defendants are liable to pay to the plaintiff the amount of the said judgment for $36,015.00 and the amount of the said costs which have been taxed at $3,052.63 together with the sum of $8,750.00 by way of interest thereon to the date hereof but the defendants have failed and refused and still fail and refuse to pay to the plaintiff the said sums or any part thereof.

And the plaintiff claims $47.817."

The defendants admit all the plaintiff's allegations of fact except that the said Chin Yoon Sin was driving the said motor lorry as a learner driver with the permission and under the tuition of the said Lai Mee Nam as alleged in part of paragraph 5 of the statement of claim. They also "deny that any such sums are or at any time have been due to the plaintiff as alleged by reason of the fact that they have never received any notice of the proceedings referred to in paragraph 6 of the statement of claim."

There are therefore 2 issues:

1) Whether Chin Yoon Sin was driving the said motor lorry as a learner driver with the permission and under tuition of the said Lai Mee Nam.

2) Whether the defendants had notice within the meaning of section 80(2)(a) of the Road Traffic Ordinance No. 49/58.

An agreed bundle of documents (Exhibit "A") was put in at the commencement of the trial and while the plaintiff called only one witness, the said Lai Mee Nam (PW1), the defendants did not call any witness at all to give evidence. According to PW1 the accident on 8th July 1963 took place when the said Chin Yoon Sin who possessed a provisional driving licence was driving the said motor lorry with his permission. He was then teaching him how to drive and was seated by his side. PW1 also said that he had told the agent of the defendants about the accident and that he had on 10th October 1963 sent a letter to the manager of the defendants notifying him of that accident. Copy of that letter is Exhibit P2.

Regarding the first issue, as evidence given by PW1 was not contradicted by the defendants I am satisfied that the said Chin Yoon Sin was driving the said motor lorry in the capacity and circumstances alleged by the plaintiff and he was therefore an "insured person" within the meaning of the said section 80(1).

In relation to the second issue the defendants are relying on section 80(2)(a) of the said Road Traffic Ordinance which reads as follows:

"80(2). No sum shall be payable by an insurer under the foregoing provisions of this section —

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings;"

The said section 80(2)(a) is identical with section 10(2)(a) of the English Road Traffic Act of 1934 except that in the English Act, the notice to be given to the insurer is notice of *the bringing of* the proceedings. As in this action the purported notice was given before the commencement of the proceedings the difference in the two statutes is in my view immaterial when considering English authorities on this issue.

A letter dated 14th February 1965 (copy of which is at pages 9 and 10 of "A" and hereinafter referred to as "the said letter") was sent by the plaintiff's solicitors to the said Chin Yoon Sin with carbon copies extended to the said Lai Mee Nam and the defendants at their Kota Bharu and Kuala Lumpur offices and the decision on the second issue would depend on whether in the circumstances of this case the said letter and extension of its carbon copies to the defendants would constitute sufficient and good notice for the purpose of the said section 80(2)(a). The defendants do not deny receipt of carbon copies of the said letter but it is also common ground that the original sent to the said Chin Yoon Sin was not received by him at the address given therein and that a second letter dated 14th March 1965 (copy of which is at pages 14 and 15 of "A") was sent to and received by him at another address. No carbon copy of the second letter was however extended to the defendants though one was extended to the said Lai Mee Nam.

It was submitted on behalf of the defendants that extension of the carbon copies of the said letter to them could not be a good notice when the said letter itself was not served on the said Chin Yoon Sin. I do not agree with this submission. The object of extending carbon copies of the said letter to the defendants was to give them notice of intended proceedings against the said Chin Yoon Sin and in my view so long as proceedings were subsequently commenced against him the carbon copies of the said letter extended to the defendants would constitute a good notice to them of those proceedings irrespective of whether the said letter was or was not served on the said Chin Yoon Sin.

There was no covering letter addressed to the defendants accompanying the carbon copies extended to them and it was also submitted on their behalf that as it was not stated in the said letter in what capacity and circumstances the said Chin Yoon Sin was driving the said motor lorry at the relevant time and as the insurance policy was not mentioned and the owner of the said motor lorry was not identified therein the said letter could not be treated as sufficient notice because it did not show that the said Chin Yoon Sin was an insured person whose liability was covered by a policy issued by them in respect of the said motor lorry. As far as the said letter was concerned the said Chin Yoon Sin was a total stranger to them. I do not also agree with this submission. The said Lai Mee Nam himself had reported the accident to the defendants about 3 months after it took place and as a carbon copy of the said letter was also extended to the said Lai Mee Nam and as the number of the said motor lorry was mentioned therein the defendants could easily have discovered from their records that the said Lai Mee Nam was the owner of the said motor lorry, that a policy had been issued to him in respect of the said motor lorry and that that policy covered any liability which might be incurred by any learner driver under tuition when driving the said motor lorry. Such being the case I consider it most unreasonable for the defendants to have taken the attitude that the said Chin Yoon Sin was a total stranger to them.

Section 134 of the Motor Car Ordinance of Ceylon (No. 45 of 1938) which bears some resemblance to our said section 80(2) provides:

"No sum shall be payable by an insurer under the provisions of section 133 — (a) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action....."

and in *Ceylon Motor Insurance Association Ltd.* v. *Thambugala*,[1] the Privy Council held that —

"the notice, in setting out the name and address of the proposed plaintiff, the name of the owner and the number of the car which caused the injuries, the date of the accident, and the sum being claimed as damages, was a sufficient notice of action under section 134(a), it not being necessary that it should contain the name of the court in which it was proposed to file action, and, accordingly, the appellants were liable to pay the sum claimed as damages."

All the particulars referred to above in the Ceylon case which were considered sufficient were also mentioned in the said letter in this action except the ownership of the said motor lorry. This, however, as I have said earlier, could easily have been found out by the defendants. The said letter also contained the additional information that legal proceedings would be taken in the High Court at Kuala Trengganu. This additional information is of vital importance when one considers that one of the objects, though not the sole object, of the notice under the said section 80(2)(a) was to enable the defendants to institute proceedings within the prescribed time to obtain a declaration of non-liability on certain specified grounds under section 80(3) of the said Road Traffic Ordinance. I am therefore satisfied that sufficient particulars had been given in the said letter to constitute it a sufficient notice to the defendants that proceedings were intended to be taken against the insured person.

The last paragraph of the said letter read as follows:

"We have accordingly been instructed to demand the payment to our client of the sum of $30,939.00 in full settlement of his claims and to file legal proceedings against you in the High Court at Kuala Trengganu unless within 10 days from receipt of this letter we receive a written admission of your liability for these claims."

The main submission made on behalf of the defendants was that those words did not constitute sufficient notice of proceedings as they amounted to no more than a conditional or a contingent threat that proceedings would proceed only if the addressee did not admit liability or if he admitted liability he did not or made no arrangements to pay.

In *Weldrich* v. *Essex & Suffolk Equitable Insurance Society Ltd.*,[2] the notice was in the following terms:

"We understand your society has repudiated liability, and we shall be grateful to have your confirmation thereof in writing, because you will appreciate, we shall have to take proceedings as against Mohamed and as against the owner of the other vehicle, and at the same time give notice to the motor insurers bureau of your repudiation of liability."

It was held that it was not a sufficient notice for the purpose of section 10(2)(a) of the English Road Traffic Act, 1934, as the main purport of that notice was to obtain confirmation of an alleged repudiation

of liability and that proceedings were only contemplated in certain circumstances. Birkett J. in his judgment at page 102 said:

"... . where there is a statutory requirement of this kind, it must be pretty strictly fulfilled. There is no evidence really before me that the defendants in this case ever did have notice of the proceedings, either before or within seven days after they had been brought. What they did have was an intimation that in certain circumstances proceedings might be brought, but not necessarily that they would be brought. This point has been called a technical point, and I suppose it is, but I think I must come to the conclusion upon the technical matter that the requirements of section 10 have not been fulfilled inasmuch as the insurer did not have notice of the bringing of the action."

In the Ceylon case the letter written by the respondent to the appellant company read thus:

"unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car."

As both letters threatened that legal proceedings would be filed the effect of the words "unless ... we receive a written admission of your liability" in the last paragraph of the said letter in this case was, in my view, the same as the words "unless our client's claim is settled" in the Ceylon case and just as the letter in the Ceylon case was held to be so I hold that the said letter in this case was also sufficient notice. The said letter was not a mere notice of claim and the legal proceedings threatened therein unless liability was admitted could not be said to be a contingent or conditional threat.

In *China Insurance Co., Ltd.*, v. *Ng Siak Yow & Ors.*[3] at page 245, the material portion of the plaintiff's letter dated 16th June, 1958, was in the following terms:

"We are instructed to claim damages from you in respect of our client's injuries. Please let us know if liability is admitted."

In his judgment Gill J., as he then was, at pages 245-246 said:

"To my mind this was nothing more than an intimation that a claim was being made and an inquiry as to whether liability was admitted. It is to be observed that in the *Thambugala* case there was a proper notice of action. I therefore cannot see how it can possibly be argued that a decision in that case helps the respondents in this case. Section 80(2)(a) contemplates the giving of notice of the proceedings in which the judgment was given. In my opinion there can be no notice of such proceedings unless it is stated in unequivocal terms that the parties intend to file an action for the recovery of damages. The notice in this case was not a notice of action but a notice of claim, which is not the same thing as a notice of action."

Further on he said:

"If the letter in this case had gone on to say that action would be brought if liability was not admitted or no reply given by a certain date or within so many days, or words to that effect, it would have been a proper notice."

Though the second passage quoted above is *obiter* I respectfully agree with and adopt the view expressed by the learned judge.

In *Halsbury's* Laws of England, Third Edition, Volume 22, at page 376, the law is summarised thus:

"The notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings, but no particular formality is required".

As admitted by counsel for the plaintiff the said letter was not an ideal notice but it nevertheless was in my view of sufficient formality to be understood by a reasonable man as an intimation that legal proceedings were to be taken against the insured person.

I therefore give judgment for the plaintiff against the defendants in the sum of $47,817 and costs.

Judgment for the plaintiff.

Solicitors: *Wrigglesworth & Co.; Hilborne & Co.*

UDHAM SINGH v. INDAR KAUR

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Pawan Ahmad J.) September 8, 1971]

[Kota Kinabalu—Federal Court Civil appeal No. 69 of 1970]

Wills and Trust — Will — Probate — Allegation that testator had no testamentary capacity — Onus of proof.

In this case the appellant had applied for revocation of the grant of probate and there had been an order directing a trial to determine the validity of the will. The appellant alleged that the testator had no testamentory capacity and that he did not have the requisite knowledge and approval of the said will. At the time of making the will the testator was a patient in hospital and had suffered from strokes.

The learned trial judge pronounced in favour of the will as he decided that the plaintiff/appellant had failed to discharge the onus of establishing testamentary incapacity on the part of the testator. The appellant appealed.

Held: the learned trial judge was wrong in putting the burden of proving testamentary incapacity on the appellant. It is clear law that the burden of proving testamentary capacity rested on the person alleging the validity of the will. In the circumstances a retrial should be ordered.

Cases referred to:-

(1) *Banks* v. *Goodfellow* (1870) L.R. 5 Q.B. 565.
(2) *Smee* v. *Smee* (1879) 5 P.D. 84 at p. 91.
(3) *Tyrrell* v. *Painton* (1894) P. 151.
(4) *Pickup* v. *Thames and Mersey Marine Insurance Co. Ltd.* (1877-78) L.R. 3 Q.B.D. 594.

FEDERAL COURT.

Dato A. Nahappan for the appellant.

Shelley Yap Yeok Siew for the respondent

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): One Dewa Singh Maan (hereinafter called the testator) had served in the Police Force, Sabah for many years. At the time of his death he was possessed of considerable property. Apart from his own language, he knew English and Malay.

In 1961 he was taken ill and was admitted in hospital in early March of that year at Kota Kinabalu. There is no evidence to show if he was ill and if he was for how long before his admission.

In hospital he had two strokes. The first was apparently not severe. The second was thought to be serious enough for him to be removed on the 15th March, 1961 to the Gleneagles Hospital, Singapore. Dr. Gethin-Jones who attended to him found that he was suffering from a right-sided hemiplegia with aphasia. There was also a diagnosis of cerebral thrombosis, left middle cerebral artery. His general condition was very good and he could reply to questioning.